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Supreme Court of the United States

October Term, 1943.

No. 614.....

COLUMBIA CHEESE CO., CONESTOGA CREAM
& CHEESE MFG. CORP., EAST SMITHFIELD
FARMS, INC., EDELSTEIN DAIRY CO. INC.,
NEWARK CHEESE CO. INC., ROSEDALE
DAIRY CO. INC., SODUS CREAMERY CORPO-
RATION, and MEYER ZAUSNER,

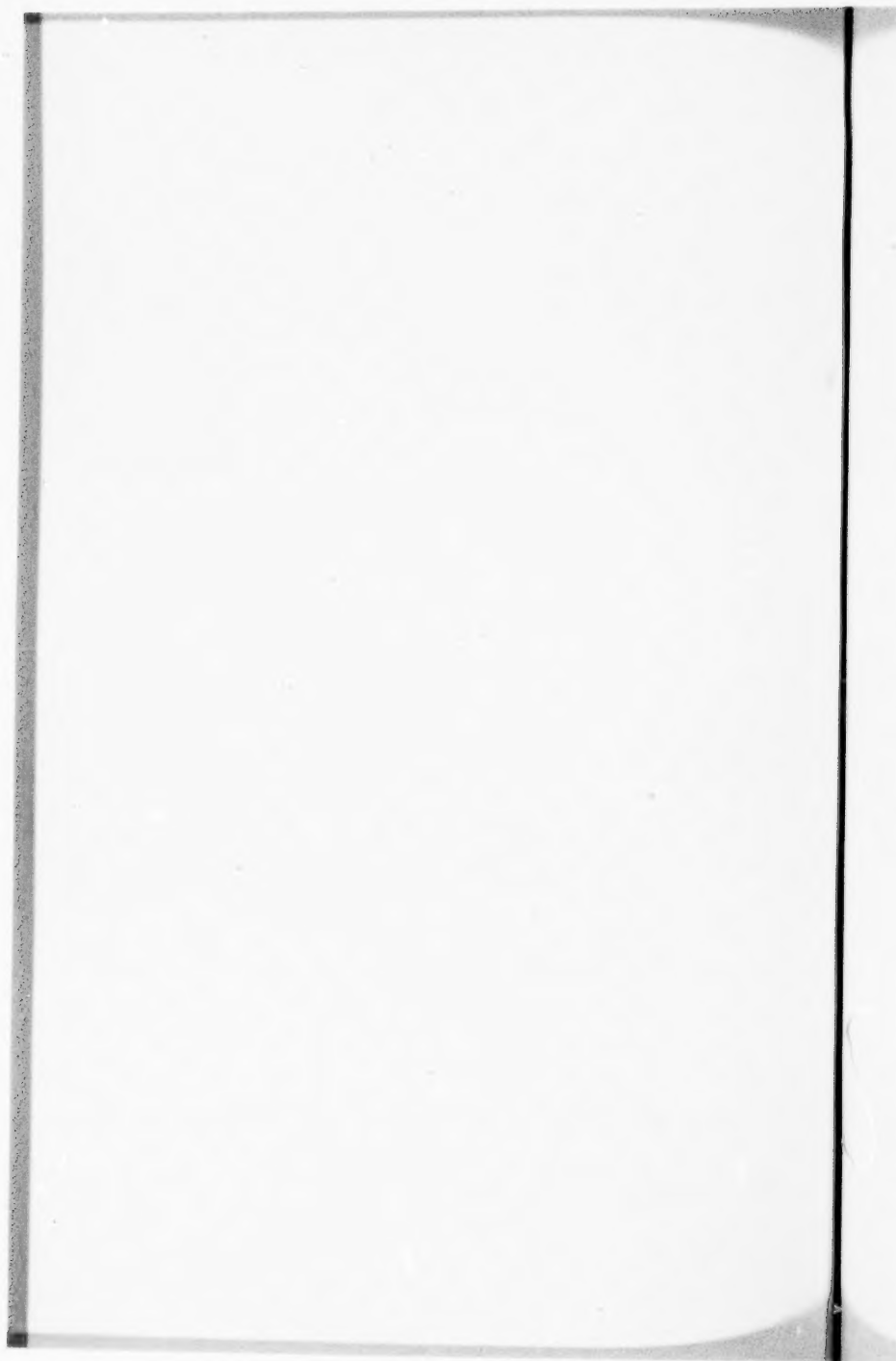
Petitioners,

AGAINST

PAUL V. McNUTT, as Federal Security Administrator
of the United States.

Petition for Writ of Certiorari to the United States Cir-
cuit Court of Appeals for the Second Circuit and
Brief in Support Thereof

MARTIN A. FROMER,
Attorney for Petitioners.



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Supreme Court of the United States

OCTOBER TERM, 1943.

No.

COLUMBIA CHEESE CO., CONESTOGA CREAM & CHEESE MFG.
CORP., EAST SMITHFIELD FARMS, INC., EDELSTEIN DAIRY
CO. INC., NEWARK CHEESE CO. INC., ROSEDALE DAIRY
CO. INC., SODUS CREAMERY CORPORATION, and MEYER
ZAUSNER,

Petitioners,

vs.

PAUL V. McNUTT, as Federal Security Administrator
of the United States.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

To the Supreme Court of the United States:

Your petitioners respectfully allege:

I.

Statute Involved.

The Federal Food, Drug, and Cosmetic Act of 1938, 52
Stat. 1046 (21 U. S. C. Section 241), provides as follows:

Sec. 401. Whenever in the judgment of the Ad-
ministrator such action will promote honesty and

fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity * * *.

II.

Summary Statement of the Matter Involved.

On December 23, 1942, after hearings held pursuant to the said Act, the Acting Federal Security Administrator promulgated regulations fixing and establishing definitions and standards of identity for "cream cheese", "neufchatel cheese", "cottage cheese" and "creamed cottage cheese". Regulation 19.515 (R. 1162) defines cream cheese as the soft uncured cheese, prepared by the procedure therein set forth, containing not less than 33 percent of milk fat and not more than 55 percent of moisture. Regulation 19.520 (R. 1163) defines "neufchatel"¹ cheese in the same terms as cream cheese except that it provides that the cheese "contains not less than 20 percent but less than 33 percent of milk fat and not more than 65 percent of moisture."

The procedure of manufacture provided for in the regulations permits the use of either of two methods, known in the trade as the "cold-pack process" and the "hot-pack process". The hot-pack process consists of heating the curd until it becomes liquid, then homogenizing it to make it smooth,—and while still liquid the cheese is poured into boxes. Cheese thus prepared is in effect pasteurized, has less bacteria, is smoother and keeps

1. There is no cheese presently known by this name. About 20 years ago an inferior product known as "neufchatel cheese" disappeared from the market and the product ~~has~~ been practically extinct since that time (Finding 45, R. 1155).

longer. "Cold-pack" cream cheese is simply cheese to which the "hot-pack" process has not been applied. Both regulations provide for the use of cream, milk or skim milk, if the product is "hot-packed", and water which is also used, since it is not specified, may not be used, although no reason for its exclusion is set forth in the findings. Regulation 19.525 defines cottage cheese as the soft uncured cheese prepared from pasteurized sweet skim milk, by the procedure therein set forth, containing not more than 80 percent of moisture.

Petitioners are cheese manufacturers. They constitute a majority of the manufacturers of cream cheese who participated in the Administrator's hearings. Petitioners have been manufacturing cream cheese, which the Administrator now brands as "neufchatel" cheese, for over 20 years in accordance with standards fixed by the Secretary of Agriculture as far back as 1903, and again in 1904, and again in similar substance in 1921. This standard provides, with regard to the fat and moisture requirements for cream cheese, that cream cheese must contain, in its water-free substance, not less than 65 percent of milk fat. Administrator's Regulation 19.515 raises the percentage of fat on a moisture-free basis to approximately 78 percent (Administrator's Finding 39, R. 1154), thereby excluding petitioner's product from the use of the name "cream cheese".

In order to give a name to the product which was thus deprived of its common and usual name, the Administrator resurrected the foreign sounding name of "neufchatel", which admittedly had long since fallen into disrepute, and affixed that name to the product of the petitioners. Practically all cream cheese to which the hot-pack process has been applied, and practically all cream cheese manufactured by petitioners and most other manufacturers, does not come within the fat and moisture limitations of the

Administrator's standard for cream cheese.² Every manufacturer but Kraft Cheese Company, applies the hot-pack process to most of its cream cheese. Every manufacturer but Kraft Cheese Company, vigorously opposed the standards fixed for cream cheese and the application of the name "neufchatel" to the product now known only by the name of "cream cheese".

Petitioners contest the validity of the regulations with respect to cream cheese and "neufchatel" cheese in the following respects: The regulations unlawfully deprive the bulk of the industry of their good will in the commonly used name of "cream cheese"; they utterly disregard existing definitions and standards of identity, and the characteristics of the product in the market; they affix a misleading name to the product now known as cream cheese and promote a monopoly in favor of the single manufacturer supporting the regulation; they are contrary to the findings in failing to make the allowance of 2 percent moisture found by the Administrator to be required; they arbitrarily exclude the use of water in the hot-pack process.

With regard to cottage cheese, Regulation 19.525 (R. 1164), the Administrator totally ignored the evidence with regard to the use of sweet unpasteurized skim milk and made no finding thereon, or other provision therefor, thereby excluding such use. The use of unpasteurized skim milk is necessary in order to secure certain desired characteristics in different types of cottage cheese, and involves no health hazard. The regulation with regard to cottage cheese also prescribes a maximum limitation of 80 percent moisture whereas the entire industry, and some of the Government's witnesses, testified that a limitation of 80 percent would be reasonable.

2. A table of the maximum moisture and minimum fat content of the highest quality cream cheese as testified by all manufacturers at the hearing appears in the Appendix to this petition.

The present petition seeks a review of the decision of the Circuit Court of Appeals which, by a divided court, sustained the action of the Administrator.

III.

Jurisdiction.

An order denying a petition for rehearing was filed September 25, 1943 (R. 1179). The judgment of the Circuit Court of Appeals was entered on October 18, 1943 (R. 1180). By an order of Mr. Justice Robert H. Jackson, dated December 17, 1943, time for filing the petition for certiorari herein, was extended to January 21, 1944 (R. 1182). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 701 (f) (4) of the Federal Food, Drug, and Cosmetic Act of June 25, 1938, 52 Stat. 1046, 1055.

IV.

Questions Presented.

The questions presented in this case are:

1. Whether the Administrator is authorized under the Act, in fixing "a reasonable definition and standard of identity" for a food "under its common or usual name so far as practicable", (a) to establish a new definition of cream cheese which excludes a major portion of the product commonly and usually known to the consumer as cream cheese without any finding that it is impracticable to retain the basic name of "cream cheese"; (b) to affix to

that major portion of the product thus excluded, the foreign sounding and misleading name of "neufchatel".

2. Whether the Administrator's definitions and standards of identity, establishing the fat and moisture content of cream and "neufchatel" cheeses: (a) are supported by substantial evidence of record; (b) are reasonable definitions and standards of identity; (c) will promote honesty and fair dealing in the interest of consumers; and (d) establish definitions of the foods in question under their common or usual names so far as practicable.

3. Whether the regulations which exclude the use of water in the hot-pack process of manufacture of cream and "neufchatel" cheeses are reasonable and based on substantial evidence.

4. Whether the regulations which exclude the use of water in the hot-pack process without any finding to support such exclusion are valid under the provisions of the Act.

5. Whether the cottage cheese regulation which excludes the use of unpasteurized skim milk, without any finding with reference to its use, is valid.

6. Whether the cottage cheese regulation limiting the maximum moisture content to 80 percent is based on substantial evidence.

V.

Dissenting Opinion in the Court Below.

The court below was divided in its decision. Mr. Justice Swan in his dissenting opinion cites at least four matters of error committed by the Administrator, which

matters of error are relied upon for the allowance of this writ (R. 1173).

VI.

Reasons Relied on for the Allowance of the Writ.

1. This is the first case to be brought before this Court which presents the issue of whether the Federal Security Administrator has the power, under the Federal Food, Drug, and Cosmetic Act of 1938, to destroy established definitions and trade practices, to exclude the major portion of a product from the use of its common and usual name, thereby depriving the bulk of an industry of its good will in that name, and to affix a strange name, wholly unfamiliar to consumers, to the product.

In *Federal Security Administrator v. The Quaker Oats Company*, 318 U. S. 218, this Court held that the Administrator has statutory authority to adopt a standard of identity which prohibits the indiscriminate addition of foreign ingredients (even though non-deleterious) to a basic food product where such addition would tend to cause consumer confusion. There was no issue in the *Quaker Oats* case as to the "identity" of farina, for the standard upheld in that case continued to define as "farina" what had always basically been known as farina. In the instant case however, what has been known to the consuming public only as cream cheese, ceases to become cream cheese as a result of administrative zeal to reform and enrich the product, and becomes, by administrative fiat, "neuf-châtel". There is moreover, no issue or finding here concerning optional ingredients or consumer confusion. The issue here moreover, is not limited to the practice of a single firm, as in the *Quaker Oats* case, but to that of an entire industry under standards in effect for 40 years.

The Court stated in the *Quaker Oats* case (p. 223) that it had granted certiorari because of the importance of the questions involved to the administration of the Foods, Drug, and Cosmetic Act. The questions involved in this case, under the same Act, are completely different from those heretofore presented and are of greater scope. Can the Administrator, under the common or usual name of a recognized product, define less than a major portion of the product? Can the Administrator change the name of a product without finding that it is impracticable to continue the use of the common or usual name? Can the Administrator, against the opposition of the entire industry, with the exception of a single manufacturer, which opposition is based upon the fact that their product is not described, establish a definition and standard of identity which fails to describe the product as generally found in the market? These are novel and far reaching issues not heretofore decided by this Court. They are of the utmost public importance and warrant the granting of this petition.

2. Because the court below, erroneously and by a divided decision, held itself powerless to review the question of the "practicability" of the continued use of the common or usual name of "cream cheese" and thereby denied petitioners the judicial review, guaranteed by the Act, of the arbitrary action of the Administrator which "deprived the bulk of the industry of their good will in the commonly used name". There was no such issue in the *Quaker Oats* case. The Act provides that the Administrator shall establish a definition and standard of identity for any food "under its common or usual name so far as practicable". The majority opinion in the court below held, "The practicability of one name or another is not, of course, a matter for our judgment" (R. 1171). The minority opinion, however, cites the requirement of the Act and holds that "without at least a finding

of impracticability, I think it unreasonable to deprive the bulk of the industry of their good will in the commonly used name" (R. 1173). The question of whether the requirement of the Act that the food be defined by "its common or usual name so far as practicable", is a matter for the court's consideration upon judicial review of an order of the Administrator, has never before been decided by this Court, or any other court, other than the divided decision in the court below.

3. Because the court below, by failing to consider existing standards, failed to decide the important issue of whether the Administrator may create a new definition and standard of identity, contrary to existing standards in accordance with which the product has been manufactured for many years. The court below ignored the definition and standard for cream cheese established by the Secretary of Agriculture in 1903, and restated in 1921. No mention is made of these standards by the court below although petitioners relied upon them as the basis for describing and defining the product in the market.

4. Because the definition of cream cheese is contrary to the Administrator's own findings. Finding 21 (R. 1151) states that in good commercial practice the percentage of fat and moisture vary as much as 2 percent above or below the percentages which the manufacturer desires to obtain in the finished product. In recognition of such variation the 35 percent for fat (Finding 20, R. 1151) was lowered to 33 percent, but the 55 percent of moisture mentioned in the same finding was not raised to 57 percent. The majority of the court states that this action of the Administrator "was peculiar to say the least since the 2 percent variation was not allowed in this constituent of the product"—a "peculiarity" which the minority opinion more accurately characterizes as "an arbitrary disregard of Finding 21".

5. Because the cream cheese standard upheld below is invalid by reason of the absence of any evidence to support basic Finding 20 (R. 1151), that most cream cheese marketed today contains from 35 to 40 percent or more of fat and 55 to 50 percent or less of moisture. The testimony of all of the witnesses was to the contrary (see Appendix). The petitioners strenuously attacked this finding in the court below and the Administrator could not defend it. The court, instead of directly passing on this finding which is perhaps the most important one in the entire order, has combined the finding with findings 23 and 37 and then expressly qualified it to the period before the discovery of the hot-pack process, which was before 1927. The court thereby failed to determine the issue of whether this finding upon which the Administrator seeks to base his regulation is supported by substantial evidence, and failed to review the order of the Administrator in accordance with the terms of the Act.

6. Because the majority opinion in the court below, erroneously and without any basis in fact, states that there was evidence that in good commercial practice water is not used in the hot-pack process, and on the basis of such an erroneous statement supports the exclusion of the use of water in the regulation (R. 1172). The Administrator himself made no such finding. The Administrator found that water is used (Finding 27, R. 1152) and made no finding of any reason why the practice should be discontinued. The absence of such a finding is pointed out in the minority opinion. The majority of the court has attempted to make a finding for the Administrator to support the Administrator's regulation. This is beyond the court's function. The fact further is that there is absolutely no evidence in the record to support such a statement and that practically all manufacturers, including Kraft Cheese Company, the lone supporter of the Administrator's standard, use water in the process (fol.

2184). There is no adulteration involved as the fat and moisture requirements must still be met in the finished product.

7. Because the majority opinion of the court below is in conflict with the Circuit Court of Appeals for the Seventh Circuit insofar as the court below sustained the Administrator's order excluding the use of unpasteurized skim milk in the manufacture of cottage cheese, despite the Administrator's failure to make a specific finding thereon. (*A. E. Staley Mfg. Co. v. Secretary of Agriculture*, 120 F. [2d] 258, cited in minority opinion in court below.) There was considerable evidence of the use of unpasteurized skim milk in the manufacture of cottage cheese. The Administrator simply ignored the evidence and made no finding with regard to its use or why its use should be discontinued. In so doing the Administrator failed to obey the mandate of the statute that he shall set forth detailed findings of fact on which his order is based (Section 701 [e]).

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit, commanding said court to certify and send to this Court a complete transcript of the record and all proceedings had in this case insofar as the same are material to the errors herein assigned, to the end that this case may be reviewed and determined by this Court; that the judgment of the Court of Appeals for the Second Circuit be reversed insofar as errors therein have been assigned by your petitioners; and that petitioners be granted such other and further relief as may seem proper.

Dated: January 17, 1944.

MARTIN A. FROMER,
Attorney for Petitioners.